

Post Conviction Relief DNA Protocol

On May 24, 2001, Attorney General Sheldon Whitehouse instituted a protocol for the Rhode Island Department of Attorney General to employ in deciding whether DNA testing could determine the existence of a wrongfully convicted defendant. The procedures have been instituted by the Attorney General in recognition of the advances being made in the field of genetics, specifically in DNA testing.

The Attorney General's protocol establishes a uniform response for prosecutors to employ when a defendant claims innocence based on newly discovered DNA evidence. The procedures set forth a range of responses required of prosecutors, based upon a variety of factors including the nature of the charge, the availability of biological evidence, and the likelihood DNA testing producing a definitive or meaningful determination of the defendant's guilt or innocence.

In some instances, as defined in the protocol, prosecutors are instructed to join the defendant's motion for post conviction relief and seek dismissal of charges upon a showing of DNA evidence that positively excludes the defendant as being the perpetrator of the crime for which he or she has been convicted.

DNA TESTING

Cases where there is a question as to whether DNA testing could determine the existence of a wrongfully convicted defendant can come to the attention of the Department of Attorney General in a variety of ways:

A Post-Conviction Relief Application stating the claim can be formally filed;
Motions in existing cases on appeal can be filed; and
Letters from defense attorneys, defendants or defendants' family members might be received. Post-Conviction matters involving cases where there is potential for DNA evidence to exonerate a wrongfully convicted defendant shall be handled in accordance with the procedures prescribed here. These procedures shall be followed whether or not formal application for post-conviction relief has been filed.

Assignment of Case - When a prosecutor becomes aware of a case where there is a question as to whether DNA testing could determine the existence of a wrongfully convicted defendant, he or she will bring it to the attention of a Criminal Division Deputy Chief. If the matter has not already been assigned, the Deputy shall assign the matter to a prosecutor who has experience in handling cases involving DNA evidence, or a prosecutor without experience handling DNA evidence who shall be assisted by a prosecutor with DNA experience.

Determination of Category - Upon assignment of such cases, the prosecutor shall determine which of the following categories the case falls into:

Category 1 Biological evidence was collected and still exists and, if the evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the defendant.

Category 2 Biological evidence was collected and still exists and, if the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results are exonerative.

Category 3 Biological evidence was collected and still exists and, if the evidence is subjected to DNA testing or retesting, even exclusionary results will be inconclusive as to guilt or innocence.

Category 4 Biological evidence either was not collected or cannot be found despite cooperative efforts of defendant and law enforcement.

Category 5 Biological evidence exists and could be tested or retested but, in the context of the case, even exclusionary results will not affect the determination of guilt.

Sources of Information & Records - In order to determine into which of the five categories a particular case falls, the prosecutor should get as much information as possible. If the prosecutor is not the prosecutor who handled the matter at trial, he or she should make an effort to discuss the case with the attorney who tried the case for the prosecution and should

also discuss the case with the defense attorney who tried the case. Record sources may include:

The Attorney General case file;

The court file;

The police file (particularly reports from the police agency's BCI);

The URI Crime Laboratory records;

The medical examiner's records;

Department of Health Forensic Laboratory records; and

The records of any hospital which treated the victim or defendant as indicated in police or court records.

Review and Maintenance of Records - All records that are available should be reviewed, and a copy maintained in the prosecutor's post-conviction relief file. There is the possibility that biological evidence could exist at any of those locations and the records should point to its location.

Adversarial Procedures - For cases falling into Category 3, 4 or 5, the prosecutor shall handle the matter in the same way as other post-conviction relief matters to uphold the conviction through the adversary process with full disclosure to defendant of any potentially exculpatory information.

If the matter is already filed as a Post-Conviction Relief matter, the prosecutor shall seek to have the matter adjudicated in as expeditious a manner as possible.

If the matter has come to the Department in any other manner, the prosecutor shall advise the defendant or his representative:

That the conclusion of the Department of Attorney General is that DNA testing is not possible or would not be productive; and

If the defendant disagrees, he or she may seek a court ruling through the Post-Conviction Relief procedures in an adversarial proceeding.

Effect DNA Testing - For cases falling into Category 1, or 2, the prosecution should cooperate with the defendant to effect testing.

Right to File - If the matter has not been filed in accordance with Chapter 10-9.1, the prosecution shall advise defendant or his representative of his right to so file and that a court will appoint an attorney if the defendant cannot afford to hire one.

Victim Contact and Notification - When the matter is filed as Post-Conviction Relief, the victim or victim's representative shall be contacted with the assistance of a member of the Victim Services Team, and the nature of the post-conviction claim and process shall be explained to the victim. This is necessary not only because it is a right of the victim to be appraised at all stages of judicial proceedings, but also because in some cases it may be necessary to seek the victim's cooperation for certain types of DNA testing.

Forensic DNA Expert Consult - When Post-Conviction Relief is filed and it has been determined that testing is warranted as the matter falls into Category 1 or 2, the prosecutor and defense counsel should jointly meet with a forensic DNA expert, usually a representative of the Department of Health, Forensic Biology Laboratory. In consultation with the expert, the Prosecutor and Defense representative shall determine:

What kinds of tests are available;

Whether the evidence is suitable for DNA testing;

What issues testing will be able to address;

Whether the currently available test will consume the available evidence; and

Whether additional samples need to be collected from the defendant and the victim or from third parties, such as other suspects or other consensual sex partners of the victim.

DNA Testing - After consultation with a DNA expert, the prosecutor should normally agree to testing as part of the Post-Conviction Relief Discovery Process.

If the Department of Health can adequately do the testing, it should be ordered done there by the Court; or

If private laboratory work is necessary, prosecution and defense should jointly seek a court order for the testing at court expense.

DNA Test Results -

If testing exonerates the defendant or strongly suggests that the defendant could not possibly be guilty of the offenses alleged, the prosecution should join in a motion to have the post-conviction relief granted;

If the results are inconclusive or inculpatory, the prosecutor should seek to have the post-conviction relief motion dismissed in as expeditious a manner as possible; and Where the testing has resulted in a DNA profile of the defendant or of the crime scene evidence, the DNA profile should be added to the appropriate DNA database.

Cooperation - This Department will not ordinarily cooperate with any defendant who resists or objects to the incorporation of DNA profiles into the appropriate DNA database as required by law.